

VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)

v.)

CRIMINAL NO. 102888)

LEE BOYD MALVO)

RESPONSE TO MOTION TO PRECLUDE THE
COMMONWEALTH FROM SEEKING A SENTENCE OF DEATH
BASED UPON THE "VILENESS" AGGRAVATOR

If the motion of the defense is to be taken as a claim of facial unconstitutionality, that claim has been rejected by the Virginia Supreme Court consistently since the year 1978. In Smith v. Commonwealth, 219 Va. 455, 476-479 (1978), such a challenge was rejected and in an unbroken line since then the Court has adhered to the Smith holding.

See: Wolfe v. Commonwealth, decided 2/28/2003

Morrisette v. Commonwealth, 264 Va. 386, 397 (2002)

Remington v. Commonwealth, 262 Va. 333, 342 (2001)

Beck v. Commonwealth, 253 Va. 373, 387 (1997)

In Sheppard v. Commonwealth, 250 Va. 379 (1995), the Virginia Supreme Court said, at page 394,

"We repeatedly have rejected the challenge that defendant makes in assignment of error No. 17 that the terms "vileness" and "depravity of mind" used in the capital sentencing scheme are unconstitutionally vague. See e.g. Stockton v. Commonwealth, 227 Va. 124, 134-135, *cert. denied*, 469 U.S. 873 (1984). Thus we reject it here."

A finding of vileness must be based on conduct which is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victims. Virginia Code §19.2-264.2. Proof of any one of these three components will support a

finding of vileness. Mueller v. Commonwealth, 244 Va. 386, 411 (1992). The defense seems to believe that the “mischief” in this case does not constitute depravity of mind.

The Commonwealth asserts that by the time a penalty phase is completed in this case, the jury will have probably received evidence of numerous homicides committed by this defendant and his partner, most of which will involve the random execution of ordinary citizens on public streets - random executions of people they did not even know, in order to intimidate government to comply with their wishes. That is “depravity of mind” in spades. The Virginia Supreme Court said in Goins v. Commonwealth, 251 Va. 442, 468 (1996), “The record also contains sufficient evidence to establish Goins’ depravity of mind. Robert Jones was a defenseless innocent child. Nevertheless, Goins decided to kill him, conducting an execution-style slaying, merely because Robert was related to Tamika.” All of the victims in this case were likewise innocent and were subjected to execution-style slayings.

In Thomas v. Commonwealth, 244 Va. 1, 25 (1992), the Court said, “Only a person of depraved mind could plan and commit the execution-style killings this record reveals yet show no remorse or regret for his actions.” It is probable that in this case the jury will learn of the planning and learn of the total lack of remorse of this defendant.

The defense calls it “mischief”, the Commonwealth calls it “a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.” That by definition is depravity of mind.

Respectfully submitted,

ROBERT F. HORAN, JR.
Commonwealth’s Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Motion to Preclude the Commonwealth From Seeking a Sentence of Death Based Upon the "Vileness" Aggravator was sent by facsimile to Michael Arif, Counsel for Defendant, and Craig S. Cooley, Counsel for Defendant, this 28th day of March, 2003.

ROBERT F. HORAN, JR.
Commonwealth's Attorney